Supreme Court, U.S.
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No. 95-1313

(3)

In The

Supreme Court of the United States

October Term, 1995

CAFE 207, INC., A Florida Corporation,

Petitioner,

vs.

ST. JOHNS COUNTY, a political subdivision of the State of Florida,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

INTRODUCTION

In the Appendix to its Brief In Opposition, respondent St. Johns County has injected evidence from outside the record in an attempt to challenge petitioner Cafe 207, Inc.'s standing to pursue review by this Court. Because respondent County's factual conclusion (that petitioner no longer owns and operates the relevant business) is entirely incorrect, petitioner is filing this very limited reply, focusing only on the question of standing. While petitioner takes issue with the majority of assertions contained in the Brief in Opposition regarding the *substantive issues* in this case, petitioner will not respond to those points herein as petitioner believes that its certiorari petition has adequately briefed all of these issues.

PETITIONER HAS STANDING BECAUSE IT NEVER RELINQUISHED OWNERSHIP OR CONTROL OF THE RELEVANT BUSINESS AND HAS NO PLANS TO DO SO

In its Brief In Opposition, respondent St. Johns County makes the unqualified but incorrect assertion that petitioner, Cafe 207, Inc., has sold and ceased operating the relevant business (*i.e.*, Cafe Erotica, located at 2620 State Road 207 within St. Johns County, Florida). That assertion, based on certain outside-the-record materials submitted in an Appendix to the County's Brief in Opposition, is in fact entirely incorrect. The correct information is set forth in the accompanying declarations of Jean

Claude Brunel (the president and owner of the corporation which the County asserts to have acquired Cafe Erotica) and Asher Sullivan (the president of Cafe 207, Inc.). These declarations are presented in the Appendix to this Reply Brief.

By way of summary, the facts are as follows: On or shortly before February 20, 1995, while Cafe Erotica remained fully owned and operated by petitioner Cafe 207, Inc., petitioner's president, Asher Sullivan, engaged in negotiations with Jean Claude Brunel, the president and sole shareholder of a corporation known as Cafe Erotica of Florida, Inc., concerning the possible sale of Cafe Erotica from Cafe 207, Inc. to Cafe Erotica of Florida, Inc. As a result, Mr. Brunel came to believe that such a transaction would be consummated on or before March 1, 1996.

In order that the potential new owner would have the legal right to operate the business upon the completion of the contemplated sale, it was necessary for the new potential owner to file all relevant license applications in advance of the closing of the sale. Accordingly, on February 20, 1996, Mr. Brunel, as president of Cafe Erotica of Florida, Inc., applied for a new state restaurant license, indicating in that application that a change of ownership would occur prospectively on or before March 1, 1996.

However, as of March 1, 1996, no sale had yet been consummated, although Mr. Brunel continued to believe it to be imminent. Accordingly, he did not then withdraw his state license application, and shortly thereafter, on March 13, 1996, while still believing that the sale was

imminent, he applied to the county for the requisite Occupational License for the business he intended to acquire.

Subsequently, and contrary to Mr. Brunel's expectations, the negotiations collapsed. As a result, Cafe Erotica *never* changed hands and has at all relevant times been, and continues to be, operated exclusively by petitioner, Cafe 207, Inc.

In response to these developments, Mr. Brunel has now sent appropriate letters to the relevant state and county licensing officials informing them of his anticipatory error and requesting the rescission of the licenses issued to his corporation. Similarly, Mr. Sullivan sent a letter to the relevant state licensing officials informing them that his corporation, Cafe 207, Inc., continues to operate Cafe Erotica without interruption and that there has been *no* sale of the business.

Moreover, as an assurance to this Court, declarant Sullivan has given his sworn promise that he has no present plans to sell the corporation and, in any event, that he will not do so in the future so long as this Court retains continuing jurisdiction over this case.

Based on the foregoing, it is respectfully submitted that there is no question of the petitioner's standing in this matter.

Respectfully submitted,

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Of Counsel

DECLARATION OF JEAN CLAUDE BRUNEL

(28 U.S.C. §1746)

I, JEAN CLAUDE BRUNEL, hereby declare as follows:

1. I am, and at all relevant times have been, the president, director, and sole shareholder of Cafe Erotica of Florida, Inc. and I submit this declaration to respond to outside-the-record material submitted as an appendix to the Opposition Brief filed by respondent St. Johns County in the case of *Cafe 207, Inc. v. St. Johns County*, United States Supreme Court Case No.: 95-1313.

2. I did file the application for a State Restaurant License shown at pages App. 2-5 of respondent County's Appendix to its Brief In Opposition recently filed in the above referenced Supreme Court case.

3. At the time I filed that application with the Florida Department of Business and Professional Regulation, Division of Hotels and Restaurants, on February 20, 1996, my corporation, Cafe Erotica of Florida, Inc., had not yet in fact acquired ownership of the business of Cafe Erotica from petitioner Cafe 207, Inc., and I said nothing in the license application form to suggest that such transfer would occur at any time prior to March 1, 1996.

4. It was my belief (which turned out to be wrong) at the time I filed that license application, that Cafe Erotica of Florida, Inc., would in fact succeed in negotiating a transfer of the business of Cafe Erotica from Cafe 207, Inc. on or prior to March 1, 1996.

5. It was further my belief that it is a common practice in Florida where one entity seeks to take over the business of a restaurant or other commercial business

owned by another entity, the new entity will apply for all necessary permits *prior to* the date that the contemplated transfer of ownership in fact actually takes place so that all necessary permits will be in effect on the date the business changes ownership. This avoids the need for the new owner to close the business while the new permits are being obtained.

6. It was further my belief that if it should happen that a contemplated transfer of ownership does not in fact occur by the estimated date for "change of ownership" indicated on a new license application, that it is a common practice for there to exist multiple Certificates of Occupancy (issued by the County) for the same business, such that either license-holder (*i.e.*, either the contemplated buyer or the contemplated seller) may in fact lawfully operate the business during the time period before the original license held by the contemplated seller expires.

7. The contemplated transfer of ownership has *not*, in fact, occurred, and, in light of recent developments, it has become clear that the originally contemplated transfer of ownership will not in fact occur at any time in the near future, if ever.

8. Moreover, neither Cafe Erotica of Florida, Inc. nor I ever took possession of the premises or other assets nor conducted any business at the location or in any other way assumed any ownership or operational control of the business. To the best of my knowledge, the pre-existing ownership, management and personnel remain unchanged.

9. In light of these developments, I have recently notified both the Division of Hotels and Restaurants of the Florida Department of Business and Professional Regulation, and the pertinent agencies of St. Johns County authorized to issue Occupational Licenses, of this changed circumstance. A copy of my letters to these officials is attached hereto.

10. In conclusion, it is my understanding and belief that the business of Cafe Erotica, located at 2620 State Road 207 in Elkton, Florida, has been, and continues to be operated by Cafe 207, Inc., the petitioner in the case of *Cafe 207, Inc. v. St. Johns County*, Supreme Court Case No.: 95-1313. I regret any confusion my anticipatory filing may have caused.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of March, 1996, within the United States of America.

/s/ Jean Claude Brunel
JEAN CLAUDE BRUNEL

CAFE EROTICA OF FLORIDA, INC.
Post Office Box 1069
Micanopy, Florida 32667

March 30, 1996

Division of Hotels and Restaurants
Dept. of Business and Professional Regulation
ATTN: Shirley C. Blaylock
1127 Arlington Road
Jacksonville, Florida 32211-5812

RE Application for License (Form 21-020)
Receipt for License (Form BPR 21-024)
File No.: 00523
Cafe Erotica of Florida, Inc.

Dear Ms. Blaylock:

I am the President of Cafe Erotica of Florida, Inc. On or about February 20, 1996, I applied, on behalf of Cafe Erotica of Florida, Inc., for a restaurant license, as above-referenced, on the basis of a change of ownership. Specifically, my license application indicated that my corporation, Cafe Erotica of Florida, Inc., would be taking over ownership of an existing restaurant by the name of Cafe Erotica, then and now owned by Cafe 207, Inc. At the time I applied for this license, I believed that my corporation would be doing business at the location specified in the license (2620 State Road 207, Elkton) as of March 1, 1996. In particular, I had engaged in tentative negotiations with the owner of the existing restaurant (Cafe 207, Inc.) for the purpose of buying the business or some portion thereof. In applying for the change of ownership, I had hoped to obtain the requisite health inspections prior to closing the transaction so that there would be no interruption of the business.

Unfortunately, the purchase negotiations have not proven successful and I will not be engaging in business at this location on the starting date indicated in my application, or at any other time for the foreseeable future. In effect, the license application was filed prematurely and in error. Accordingly, there will be no change in the owner of the business and Cafe 207, Inc. should continue to be listed as the owner of record with the Division of Hotels and Restaurants. Kindly revise your records to reflect the fact that there has been no change of ownership. If there is any refund due my corporation for the canceled application, please forward that refund to Post Office Box 1069, Micanopy, Florida 32667.

If you have any questions regarding the status of the license, or encounter any difficulties in correcting your records, please contact me at (352) 466-3803. Also, if there are any further documents required to cancel my license application, please direct them to my attention. Your assistance is greatly appreciated.

Sincerely,

/s/ Jean-Claude Brunel
Jean-Claude Brunel, President
Cafe Erotica of Florida, Inc.

JCB/gse

CAFE EROTICA OF FLORIDA, INC.
Post Office Box 1069
Micanopy, Florida 32667

March 30, 1996

Dennis W. Hollingsworth
Tax Collector
Post Office Box 9001
St. Augustine, Florida 32085-9001

RE: Occupational License No.: 06708/Acct. No.: 22834-0
Cafe Erotica of Florida, Inc.

Dear Sir:

I am President of Cafe Erotica of Florida, Inc. On or about March 13, 1996, I applied for and received, on behalf of Cafe Erotica of Florida, Inc., a St. Johns County Occupational License to operate the Cafe Erotica Restaurant located at 2620 State Road 207, in Elkton, Florida. At the time I applied for this license, I believed that my corporation would be doing business at the location. In particular, I had engaged in tentative negotiations with Cafe 207, Inc., the owner of the existing restaurant, for the purpose of buying the business or some portion thereof.

Unfortunately, these negotiations have not proven successful and I will not be engaging in business at the specified location or anywhere else in St. Johns County during the term specified in my license. Please take whatever steps may be necessary to void the occupational license issued to Cafe Erotica of Florida, Inc. If there is any refund due my corporation for the unexpired term of

the license, please forward that refund to Post Office Box 1069, Micanopy, Florida 32667.

If you have any questions regarding the cancellation of this license, or encounter any difficulties with my request, please contact me at (352) 466-3803. Your assistance is greatly appreciated.

Sincerely,

/s/ Jean-Claude Brunel
Jean-Claude Brunel, President
Cafe Erotica of Florida, Inc.

JCB/gse

DECLARATION OF ASHER SULLIVAN

(28 U.S.C. §1746)

I, ASHER G. SULLIVAN, hereby declare as follows:

1. I am, and at all relevant times have been, the president of Cafe 207, Inc., the owner and operator of Cafe Erotica, a restaurant/exotic dancing establishment located at 2620 State Road 207 in Elkton Florida, within St. Johns County, Florida, and petitioner in the case of *Cafe 207, Inc. v. St. Johns County*, Supreme Court Case No.: 95-1313.

2. I make this declaration to respond to certain outside-the-record material submitted as an appendix to the Opposition Brief filed by respondent St. Johns County in the case of *Cafe 207, Inc. v. St. Johns County*, Supreme Court Case No.: 95-1313, specifically, the state restaurant license application of Cafe Erotica of Florida, Inc. which appears to have been filed by its president, Jean Claude Brunel, with state authorities on February 20, 1996, indicating a change of ownership of Cafe Erotica, the business operated by my company, petitioner, Cafe 207, Inc., as of March 1, 1996.

3. While there had been discussions between Mr. Brunel and me of transferring ownership of Cafe Erotica from Cafe 207, Inc. to Cafe Erotica of Florida, Inc. (the business operated by Mr. Brunel, its president), these discussions did *not*, in fact, result in a sale of the business, contrary to the expectation of Mr. Brunel on February 20, 1996, when he filed the application which is attached to respondent's Brief in Opposition.

4. In fact, petitioner Cafe 207, Inc., continues to fully own and operate this business and has done so without interruption since prior to the initiation of the lawsuit entitled *Cafe 207, Inc. v. St. Johns County*, United States Supreme Court Case No. 95-1313, and there are no immediate plans to transfer its ownership to Cafe Erotica of Florida, Inc., or any other entity. Moreover, I assure this Court that, in any event, there are no present plans to sell this business and that I will not authorize any sale of Cafe Erotica prior to completion of this Court's review of this case.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of March, 1996, within the United States of America.

/s/ Asher G. Sullivan
ASHER SULLIVAN

CAFE 207, INC.
2620 State Road 207
Elkton, Florida

March 30, 1996

Division of Hotels and Restaurants
Dept. of Business and Professional Regulation
ATTN: Shirley C. Blaylock
1127 Arlington Road
Jacksonville, Florida 32211-5812

RE Application for License (Form 21-020)
File No.: 00523
Cafe Erotica of Florida, Inc./Cafe 207, Inc.

Dear Ms. Blaylock:

I am the President of Cafe 207, Inc., the owner and operator of the Cafe Erotica restaurant located at 2620 State Road 207, in Elkton, Florida. Cafe 207 Inc. possesses a valid state license for this business which has not yet expired. Your division recently accepted an Application for License from Jean-Claude Brunel on behalf of Cafe Erotica of Florida, Inc. indicating that it was going to be the new owner of the restaurant. That Application was made in error on the assumption that Cafe 207, Inc. would be selling its business to the new applicant. While there were purchase negotiations between these parties, the transaction was never consummated and Cafe 207, Inc. continues to operate the Cafe Erotica business. The change of ownership application was filed prematurely and does not reflect the circumstances as they actually developed.

That being the case, I would ask that you disregard the change of ownership application filed by Cafe Erotica

of Florida, Inc. and that you update your records to reflect the continued ownership of the restaurant by Cafe 207, Inc.

If you have any questions concerning this matter, please contact the attorney for Cafe 207, Inc., Gary S. Edinger at (352) 338-4440. Your assistance is greatly appreciated.

Sincerely,

/s/ Asher G. Sullivan
Asher G. Sullivan, President
Cafe 207, Inc.

AGS/gse